

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1996 MTWCC 69

WCC No. 9602-7506

JOHN RAYMOND CATTANEO

Petitioner

LIBERTY MUTUAL FIRE INSURANCE COMPANY

Respondent/Insurer for

SUPERVALU

Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: 62-year old supermarket truck driver suffered broken jaw when tractor/trailer handle hit his face. He sought reimbursement for blender, vitamins, Aleve, baby food, and Ensure, as well as compensation for his injury. He was able to continue working, including overtime, but testified his jaw hurts, particularly in cold weather, and impacts him mentally.

Held: Issues alleged by pro-se claimant are restated by the Court as requesting medical and permanent partial disability benefits. Where physician recommended soft food, dietician suggested supplementation with vitamins, and claimant's wife described need to blend food, WCC found blender and vitamins reasonable and necessary primary medical expenses. Insurer conceded it would pay for Aleve, baby food, and Ensure. WCC denied permanent partial disability benefits where the record contained no impairment rating and claimant's testimony indicated he has performed his work successfully. While claimant testified his jaw hurts in cold weather, it does not interfere with his employment.

Topics:

Benefits: Medical Benefits: Primary Medical Services. Supermarket truck driver who broke jaw during employment was entitled to reimbursement for blender, vitamins, Aleve, baby food, and Ensure as reasonable and necessary primary medical services where physician recommended soft food, dietician recommended supplementing with vitamins, and claimant's wife described process of blending food and adding supplements.

Benefits: Permanent Partial Disability: Generally. Although claimant testified his jaw hurt in cold weather, there was no evidence of an impairment rating or that mended broken jaw interfered with claimant's ability to work. Thus, permanent partial disability benefits were denied.

The trial in this matter was held on August 26, 1996. Petitioner, John Cattaneo, representing himself, participated by telephone. Respondent, Liberty Mutual Fire Insurance Company (Liberty) was represented by Mr. Larry W. Jones, who was present at the Court. Exhibits 1 through 6 were admitted and the deposition of Mr. Cattaneo is considered a part of the record. Mr. Cattaneo and his wife, Mary Cattaneo, testified.

Issues Presented: Claimant petitioned for: 1) "10,000 or reasonable settlement;" 2) for a determination that the accident was "a preventable accident, not just a normal accident;" and 3) for a determination that he is entitled to "some satisfaction coming for some damage that I have." (Petition for Hearing at 2.) The Workers' Compensation Court does not have jurisdiction to make a determination regarding whether the accident was preventable. The Court recharacterizes the issues as follows: 1) whether the respondent is liable for those expenses submitted by the claimant, and 2) whether claimant is entitled to permanent partial disability benefits.

Following trial claimant submitted six pages of information, including an itemization of expenses. Liberty responded with a letter indicating its agreement to pay for some of the requested expenses but not others.

Having considered the Pretrial Order, the testimony presented at trial, the deposition, the exhibits, and the post-trial filings of the parties, the Court makes the following:

FINDINGS OF FACT

1. Claimant is 62 years old and resides in Billings, Montana. Claimant is a high school graduate.
2. Claimant has worked for Supervalu for approximately 17 ½ years. (Cattaneo Dep. at 15.) Claimant's job at the time of his injury was as a driver of an 18-wheeler, delivering groceries to different grocery stores in various cities. (*Id.* at 6.)
3. On February 16, 1995, claimant was injured while in the course and scope of his employment when he was "hooking the trailer to the tractor, turning the handel [sic] to left landing gear, when I released handel [sic] it sprang back hitting me in the jaw breaking it on bothe [sic] sides & knocking teeth loose." (Petition for Hearing at 1, Cattaneo Dep. at 5-6.) Liberty accepted liability and paid temporary total disability benefits and medical benefits.
4. Claimant suffered "a markedly displaced fracture through the body of the right side of his mandible as well as a nondisplaced fracture through the left side of the mandible." (Ex. 1 at 1.)

5. On February 16, 1995, Dr. Mackay Hull, M.D., an oral and maxillofacial surgeon, performed surgery on claimant for "multiple mandibular fractures complicated fractures." (Ex. 4 at 2.)

6. Dr. Hull discharged claimant from the hospital on February 18, 1995, instructing that he seek follow-up laboratory studies and an evaluation for possible hypertension. (*Id.* at 9.) In the discharge report Dr. Hull noted that he discussed "the necessity of a strict liquid/soft diet. . ." while claimant's jaw healed. (*Id.*, emphasis added.)

7. Dr. Hull released the claimant to return to work on April 21, 1995.

8. Claimant returned to work. Claimant testified that he does not have any physical restrictions in doing his work but that cold weather affected his jaw, causing it to ache. He wears a scarf "to keep it from aching" and occasionally takes aspirin and Aleve. (Cattaneo Dep. at 9, 11.) When asked whether it interfered with his work, he replied, "Mentally, yes." He went on to explain, "It makes me upset because it [the accident] happened and it shouldn't have happened." (*Id.* at 12.) He has a loss of feeling in part of his jaw (*id.* at 10) and has developed a nervous twitch. There is no indication that either condition interferes with his work. (*Id.* at 13.)

9. Since the injury he has had at least one salary increase and is presently earning more than at the time of his injury. Claimant regularly bids for and works overtime, up to 15 hours per week. (Cattaneo Dep. at 25.)

10. Dr. Schnitzer, claimant's family physician, reported on July 25, 1995, that claimant "did in fact seem to develop hypertension following events earlier this year . . ." and that he anticipated "continuing to see him periodically for hypertension but most importantly he has developed chronic headaches with symptoms of anxiety and depression with a sleep concern and evidence of 'Post-Traumatic Stress Disorder.'" The doctor indicated claimant had not sustained a permanent physical restriction except as related to hypertension and that it was his expectation he would be involved with the care of the claimant "for sometime [sic] due to the nature of his present concerns." (Ex. 5 at 5-6.) He noted that claimant's blood pressure was currently under control and he was "normotensive" (normal blood pressure). (*Id.* at 5.)

11. When asked if his injury "placed any physical restrictions on yourself and the work you now do?" claimant replied, "I'm a lot more cautious," and indicated he did not have the same stamina as before. (Cattaneo Dep. at 19.) Currently claimant does not sleep as much and is still troubled that the accident occurred but there is no indication he is currently being treated for anxiety or depression. He also testified that he takes longer to perform tasks at work "because I'm thinking of it, mentally." (*Id.* at 25.)

12. The medical records do not contain an impairment rating.

13. Claimant requested that the following costs be paid.

Requested:

Blender	\$210.00
Vitamins	96.00
Aleve	42.00
Baby food	115.00
Ensure	<u>280.00</u>
Total	\$743.00

Liberty agrees to pay the following amounts:

Aleve	\$ 42.00
Baby food	115.00
Ensure	<u>280.00</u>
Total	\$437.00

Thus, the only disputed items are the cost of the vitamins and the blender.

14. Mary Cattaneo testified that as a result of the injury it was necessary to purchase a blender in order to puree claimant's food and to supplement his diet with such products as Ensure so that claimant's diet contained sufficient protein. She also stated that vitamins were necessary in light of claimant's restricted diet.

15. Marci Butcher, Clinical Dietitian at St. Vincent Hospital and Health Center, provided a copy of information furnished to persons with wired jaws or jaw and neck surgery. This material contains general information about food preparation, suggestions for nutrition and menus. (Marci Butcher's Letter of 9/3/96 with attachments.)

16. I find that the blender and vitamins were reasonable and necessary medical costs.

CONCLUSIONS OF LAW

1. The law in effect at the time of the injury governs the claimant's entitlement to benefits. *Buckman v. Montana Deaconess Hospital*, 224 Mont. 318, 730 P.2d 380 (1986).

Thus the 1995 version of the Act applies.

2. At the time of the injury, payment for medical, hospital and related services was, in pertinent part, as follows:

(1) In addition to the compensation provided under this chapter and as an additional benefit separate and apart from compensation benefits actually provided, the following must be furnished:

(a) After the happening of a compensable injury and subject to other provisions of this chapter, the insurer shall furnish reasonable primary medical services for conditions resulting from the injury for those periods as the nature of the injury or the process of recovery requires.

Section 39-71-704(1)(a), MCA (1993). Primary medical services are defined as:

(21) "Primary medical services" means treatment prescribed by a treating physician, for conditions resulting from the injury, necessary for achieving medical stability.

Section 39-71-116(21), MCA, (1993).

The blender and vitamins fall under the primary medical category definition. Dr. Hull noted the need for a soft/liquid diet. Whatever was reasonably necessary to provide a soft/liquid diet was encompassed, by implication, within Dr. Hull's prescription. The records from Marci Butcher, Clinical Dietitian at St. Vincent Hospital, discusses generally the use of a blender to maintain a liquid/soft diet. The testimony of Mary Cattaneo supported the necessity of the blender in food preparation for the claimant during his recuperation, and for some months after claimant returned to work. In light of claimant's restricted diet and difficulty eating, the Court believes that vitamins were a reasonable supplement to his diet. Therefore, the claimant has demonstrated both items were reasonable medical expenses necessary to his recuperation.

Liberty has agreed to pay the costs for the Ensure, the baby food, and the over-the-counter pain medication in the amount of \$437. Since the Court has determined that the blender and vitamins are reasonable medical costs, Liberty shall also pay those costs. Thus, claimant is entitled to medical reimbursement of \$743.

3. Claimant has the burden of proving that he is entitled to workers' compensation benefits by a preponderance of the probative, credible evidence. *Ricks v. Teslow Consolidated*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wicken Bros. Construction Co.*, 183 Mont. 190, 598 P.d. 1099 (1979). He has failed to carry his burden with respect to permanent partial disability benefits.

Permanent partial disability benefits are governed by section 39-71-703, MCA (1995). In the first instance, the injured worker must in fact suffer a permanent partial disability.

"Permanent partial disability" is defined as follows:

(18) "Permanent partial disability" means a condition, after a worker has reached maximum medical healing, in which a worker:

(a) has a medically determined physical restriction as a result of an injury as defined in 39-71-119; and

(b) is able to return to work in some capacity but the physical restriction impairs the worker's ability to work.

Section 39-71-116(18), MCA (1993) (emphasis added).

This Court discussed and applied the definition in *Williams v. Plum Creek Timber Co.*, WCC No. 9403-7017, (June 28, 1994). In that case claimant suffered a compound fracture of his big toe and an amputation of a portion of his fifth toe. He was assigned a 1% impairment rating and experienced aching and pain in his toes in cold weather. His physician testified that he could not tolerate cold for long periods of time. Claimant had previously worked as a sawyer and timber faller, jobs which required him to work in very cold conditions for long periods of time. The Court held that the medical testimony established a "medically determined physical restriction" which interfered with claimant's work. I further held that "work," as used in section 39-71-116(18)(b), encompasses jobs within a claimant's normal, preinjury labor market. Since claimant was physically restricted from working as a timber faller or a sawyer, I found that he satisfied the definition of permanent partial disability.

In this case the claimant reached maximum medical healing and was released to return to work in April 1995. He has performed his work successfully, including bidding for and being allowed to work overtime. The only notable problem experienced by the claimant is his jaw aches when the weather is cold. However, it does not interfere with his working. Moreover, a review of the medical records does not reveal that either Dr. Hull or Dr. Schnitzer have medically determined that claimant has any physical restriction as a result of his injury other than with regard to his hypertension, which is fully controlled. Claimant testified that he is not physically restricted from doing his work. Claimant therefore does not satisfy the definition of permanent partial disability and is not entitled to benefits at this time.

JUDGMENT

1. This Court has jurisdiction over this matter pursuant to s 39-71-2905, MCA.
2. Claimant is entitled to reimbursement for out-of-pocket medical expenses in the total amount of \$734.
3. Claimant is not entitled to permanent partial disability benefits at this time.
4. Claimant is entitled to his costs if any. He shall have ten days from the date of this decision within which to submit an affidavit of costs. Liberty shall thereafter have ten days in which to file its objections, if any.
5. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

6. Any party to this dispute may have 20 days in which to request a rehearing from these Findings of Fact, Conclusions of Law and Judgment.

DATED in Helena, Montana, this 4th day of November, 1996.

(SEAL)

/s/ Mike McCarter

JUDGE

c: Mr. John Raymond Cattaneo - Certified Mail (Enclosure: Copy of Cost Rule)

Mr. Larry W. Jones

Submitted Date: September 27, 1996